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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1927.

No. [redacted] 685 41

NORTHERN COAL & DOCK COMPANY AND GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,
*Petitioners,*

*vs.*

EMMA STRAND AND INDUSTRIAL COMMISSION OF WISCONSIN,
*Respondents.*

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

## BRIEF OF PETITIONERS.

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OCTOBER TERM, 1927.

No. 658.

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NORTHERN COAL & DOCK COMPANY AND GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,

*Petitioners,*

*vs.*

EMMA STRAND AND INDUSTRIAL COMMISSION OF WISCONSIN,

*Respondents.*

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CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

## BRIEF OF PETITIONERS.

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### OPINIONS BELOW.

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This case comes to this court on a writ of certiorari to the Supreme Court of the State of Wisconsin.

The decision of the Supreme Court of Wisconsin is *Northern Coal & Dock Company* v. *Industrial Commission,* 193 Wis. 515, 213 N. W. 658.

### JURISDICTION.

Jurisdiction is conferred by Article III, Section 2, of the Constitution of the United States. The decision to be reviewed was filed May 3, 1927. A rehearing was de-

nied October 11, 1927. (Rec., 55, 58, and 59.) Jurisdiction is based on the fact that the Industrial Commission of the State of Wisconsin, the Circuit Court of Dane County, Wisconsin, and the Supreme Court of the State of Wisconsin have erroneously held in this case that the Industrial Commission had power to make an award in favor of the widow of a deceased employee when the employee was killed while working as a stevedore on the navigable waters of Lake Superior. Jurisdiction has been sustained in *Southern Pacific Company* v. *Jensen*, 244 U. S. 205; *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *State of Washington* v. *W. C. Dawson Co.* 264 U. S. 219; *Gonsalves* v. *Morse Dry Dock & Repair Co.* 266 U. S. 171.

## Statement of Facts.

As stated on page 1 in the brief filed by respondents' counsel in opposition to the petition for writ of certiorari, the facts in this case are not in dispute. They may briefly be summarized as follows:

On October 20, 1924, one Charles Strand was instantly killed while working in the hold of a vessel docked at the property of the respondent, Northern Coal & Dock Company, on Superior Bay, a navigable portion of Lake Superior, at Superior, Wisconsin. Strand was an employee of the Northern Coal & Dock Company, whose business was the mining, handling, and selling of coal at wholesale. The company does not own any boats of its own. (Rec., 31-32.) From time to time the Northern Coal & Dock Company (hereinafter for convenience referred to as the employer) had occasion to unload coal from vessels at its dock. On such occasions Strand and other employees would be pressed into that service.

That was the work he was doing at the time of the accident which resulted in his instantaneous death. The deceased and his employer were subject to the Workmen's Compensation Act of Wisconsin so far as that law is applicable. The only question involved now is whether that act is applicable to such a maritime accident as occurred in this case.

After the death of Charles Strand his widow, Emma Strand, filed an application with the Industrial Commission of the State of Wisconsin, in which she asked for compensation from the employer and the insurance company carrying the compensation risk. This application was opposed, but an award was made in favor of the widow granting her death benefits in the sum of $4,653.56 and $200 burial expenses. (Rec., 7.)

The employer and insurance carrier brought an action pursuant to the statutes of the State of Wisconsin to review this award. This resulted in a judgment affirming the award. (Rec., 50.)

The employer and insurance carrier thereupon appealed from said judgment to the Supreme Court of the State of Wisconsin on the ground that the Industrial Commission had no jurisdiction to make the award for the reason that the case was controlled by the admiralty law and by Article III, Section 2, of the Constitution of the United States. The judgment was affirmed and is now here for review. The opinion appears on Record page 55 and the court's opinion filed after motion for rehearing appears on Record page 59.

## Errors.

The Supreme Court of Wisconsin erred in not reversing the judgment of the Circuit Court of Dane County.

## ARGUMENT.

It is well established by decisions of this court that the states have no power to change, modify, or affect the general maritime law. To apply the Workmen's Compensation Act of Wisconsin to this case would clearly work material prejudice to the characteristic features of the general maritime law and would interfere with the proper harmony and uniformity of that law. The decision of the Wisconsin Supreme Court, which is here for review (Rec., 55) cites the following cases which were relied on by appellants in that case and which we rely on here, to wit:

*Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479.

*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149.

*State of Washington* v. *W. C. Dawson Co.* 264 U. S. 219.

*Gonsalves* v. *Morse Dry Dock & Repair Co.* 266 U. S. 171.

*Robins Dry Dock & Repair Co.* v. *Dahl*, 45 Sup. Ct. 157; 266 U. S. 449, 457; 69 L. Ed. 372.

but concludes that as Strand was instantly killed there was no liability at common law, and that "no question of maritime tort is therefore involved as that matter was understood at common law."

The court then states that where state statutes give a remedy for death by wrongful act and the act is done on navigable waters, courts of admiralty will enforce the liability thus created. The Wisconsin court then states:

> "Congress legislated with reference to the general subject matter of death by wrongful act in 1920. The statute contained the following provision: 'The provisions of any state statute giving or

regulating rights of action or remedies for death shall not be affected by this act nor shall this act apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal zone.' 41 Stats. L. c. 111, p. 537 (U. S. Comp. St. sec. 1251½-f.)

Therefore, if any liability exists on account of the death by wrongful act of the employee, Strand, it arises under the Wisconsin Statutes, which give such a right. Section 331.03."

The Wisconsin court clearly fell into error in misconstruing the purpose and application of the Act of March 30, 1920. Long prior to the adoption of this act the Supreme Court of the United States held that death actions could be maintained under the state statutes. The sole purpose of the Act of March 30th was to create a cause of action in death actions happening on the high seas where the local statutes were not applicable. The Jones Act of June 5, 1920, was adopted subsequently to that of March 30, 1920, and creates a cause of action for the benefit of seamen. There is nothing in the March act which in any way permits a seaman to prosecute his action under the local statutes or to recover compensation under local statutes. This court has definitely determined that a stevedore is a seaman within the meaning of the Jones Act. *International Stevedoring Co.* v. *Haverty,* 47 Sup. Ct. Rept. 19.

It cannot be questioned that the widow of the deceased in this case could prosecute a cause of action under the Jones Act. Nothing is better established than the fact that where Congress has legislated relative to maritime torts that legislation must be considered as the uniform law and that a person cannot at his election proceed under the uniform maritime law or under a local compensation act.

The exact question here involved was decided in *West-*

*ern Fuel Co.* v. *Garcia,* 257 U. S. 233. In that case the deceased was instantly killed while employed as a stevedore and working in the hold of a vessel. Recovery was refused under the California Workmen's Compensation Act and this court then sustained the right of the widow to bring a libel *in personam* in the United States District Court. In that case the Supreme Court discusses *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, *Chelentis* v. *Luckenbach Steamship Co.* 247 U. S. 372, *Union Fish Company* v. *Erickson,* 248 U. S. 308, and *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, in which this court pointed out the inability of the states to change the general features of the maritime law so as to defeat uniformity, but affirmed the power of the states to make some modifications or supplements thereto.

It seems clear to us from a reading of the decisions of this court that this court has uniformly acknowledged the right of the states to supplement the maritime law by adding thereto the right to sue for wrongful death, at the same time adhering to the rule of uniformity by not conceding the right to make local compensation acts applicable to maritime torts.

Under the Jones Act (June 5, 1920) there can be no question about the rule, as Congress has now legislated on the subject, thus precluding the right of the states to adopt contrary legislation.

Following the motion for a rehearing Mr. Justice Stevens of the Supreme Court of Wisconsin filed a concurring opinion (Rec., 59) in which he expresses the opinion that the right of the widow does not grow out of an action sounding in tort, but arises out of a contract made between the employer and employee under the Workmen's Compensation Act. He concludes that the deceased was not a stevedore and states that the deci-

sions of this court recognize the power of state courts to enforce rights under Workmen's Compensation Acts in all cases where the injured employee was neither a seaman nor a stevedore if the injuries were received upon navigable waters, citing *Grant Smith-Porter Ship Company* v. *Rohde*, 257 U. S. 469, and *Millers' Indemnity Underwriters* v. *Braud*, 270 U. S. 59.

In the Grant Smith-Porter Ship Company case the injured man was working on an incompleted vessel and this court held that he was not doing maritime work at the time.

In the Millers' Indemnity Underwriters case the injury occurred to a diver who was cutting off piles in a river and this court held that to bring such work under the compensation act of a state did not materially affect the general maritime law. This court said:

> "The matter is of mere local concern and its regulation by the state will work no material prejudice to the characteristic feature of the maritime law."

We submit that Mr. Justice Stevens misconstrued the decisions of this court and overlooked the fact that the deceased clearly was a stevedore and was doing maritime work at the time of his injury. The test as to whether or not he was a stevedore does not depend upon the general nature of his employment, but depends upon the kind of work he was doing at the time of his injury. The admiralty jurisdiction in tort matters depends upon locality.

*Waring, et al.* v. *Clarke*, 5 How. 441, 459; 12 L. Ed. 226.

*R. R. Co.* v. *Towboat Co.* 23 How. 209, 215; 16 L. Ed. 433.

*The Propeller Commerce*, 1 Black 574, 579; 17 L. Ed. 107.

*The Plymouth*, 3 Wall. 20, 33; 18 L. Ed. 125.

*Leathers* v. *Blessing*, 105 U. S. 626, 630; 26 L. Ed. 1192.

*Martin* v. *West*, 222 U. S. 191, 197; 32 Sup. Ct. 42; 56 L. Ed. 159, 36 L. R. A. (N. S.) 592.

*Gonsalves* v. *Morse Dry Dock & Repair Co.* 45 Sup. Ct. 39; 266 U. S. 171; 69 L. Ed. 228.

*Robins Dry Dock & Repair Co.* v. *Dahl*, 45 Sup. Ct. 157; 266 U. S. 449, 457; 69 L. Ed. 372.

That we are correct in our contention is shown by a recent decision of this court, to wit: *T. Smith & Son, Inc.* v. *Fannie Robinson Taylor*, decided February 20, 1928, No. 7 Advanced Opinions, page 273. In that case Mr. Justice Butler said:

> "Deceased was engaged in maritime work under a maritime contract. If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated section 2 of art. 3. But, if the cause of action arose upon the land, the state law is applicable."

We submit further that the employment contract between the Northern Coal and Dock Company and Strand did not imply an agreement to pay compensation for maritime accidents, nor an agreement by Strand or his widow to waive any right to sue under the maritime law.

As the compensation act can have no application to maritime accidents, it cannot properly be said that the parties to the contract of employment either expressly or impliedly agreed to change or extend the compensation act.

It may be said that as a part of the contract of employment the Northern Coal & Dock Company agreed to pay compensation if the employee should be injured under such circumstances as would make the compensation

act apply, but it cannot be said that there was any agreement to pay compensation under any other circumstances.

In other words, the Constitution and laws of the United States are just as much a part of a contract of employment as are the laws of a state.

We respectfully submit that this case is controlled by *Southern Pacific Co.* v. *Jensen*, 244 U. S. 203, in which case this court held that the Workmen's Compensation Commission of New York had no jurisdiction to make an award in favor of the dependents of a man who was engaged in unloading a steamship because the man was injured while he was on the vessel.

Respectfully submitted,

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